Supreme Court, U.S.
FILED
DEC 3 - 2010
OFFICE OF THE CLERK

No. 10-562

In The Supreme Court of the United States

ALYSON J. KIRLEIS,

Petitioner,

v.

DICKIE, McCAMEY & CHILCOTE, P.C.,
a Pennsylvania Professional Corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

EDWARD B. FRIEDMAN
Counsel of Record
GLORIA A. AIELLO
FRIEDMAN AND FRIEDMAN
900 Fifth Avenue
Pittsburgh, PA 15219
Email: ebf@friedman-law.com
Tel. (412) 261-5834

Attorneys for Petitioner
Alyson J. Kirleis

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO OPPOSITION BRIEF 1

I. Petitioner Has Stated Compelling Reasons for Certiorari in Accordance with Supreme Court Rule 10 1

II. The Third Circuit's Decision Effectively Creates a Special Status for Law Firms and Other Professional Corporations in Their Employment of Female Professionals Which Is Not Permitted by *Clackamas* 3

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 1

Clackamas Gastroenterology Associates, PC v. Wells, 538 U.S. 440 (2003) 1, 2, 3, 4, 12

RULES

Sup. Ct. R. 10 1

Sup. Ct. R. 10(a) 1

Sup. Ct. R. 10(c) 2, 3

REPLY TO OPPOSITION BRIEF

I. PETITIONER HAS STATED COMPELLING REASONS FOR CERTIORARI IN ACCORDANCE WITH SUPREME COURT RULE 10.

Respondent's assertion that Petitioner has not stated compelling reasons for her petition to be granted in accordance with Supreme Court Rule 10, *Brief in Opposition* ("*Opp.*") at 10-13, is patently incorrect. As Petitioner has demonstrated, and Respondent does not dispute, the Third Circuit failed to meet the well-established standard for considering motions for summary judgment stated by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *Petition for Writ of Certiorari* ("*Pet.*") at 12-15. Petitioner also demonstrated, again without any refutation by Respondent, that the Third Circuit actually defied this Court by sanctioning the district court's application of the economic realities test which was expressly rejected by this Court in *Clackamas Gastroenterology Associates, PC v. Wells*, 538 U.S. 440 (2003). *Pet.* at 15-19. Clearly, such conduct by the Third Circuit falls squarely within the parameters of Supreme Court Rule 10(a) as it reflects a decision by the Third Circuit which "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a).

Petitioner has also demonstrated that this case merits review by the Court under Supreme Court

Rule 10(c) because the Third Circuit "has decided an important federal question in a way which conflicts with relevant decisions of this Court," namely *Clackamas*. *Pet.* at 19-25. There can be no doubt that the issue of whether the protection afforded by anti-discrimination laws is available to female attorneys in law firms who have been relegated to secondary status despite corporate formalities which purport to give them ownership rights is an important federal question. In the instant case, the Third Circuit sanctioned the district court's refusal to look behind the corporate formalities of Respondent's By-Laws to the underlying realities that Petitioner had no effective opportunity to control or manage Respondent or share in its profits thereby denying Petitioner the ability to seek redress under Title VII and the Equal Pay Act for Respondent's discriminatory conduct. The Third Circuit chose to ignore voluminous facts developed during discovery which established Petitioner's lack of effective ownership rights in Respondent.

Respondent makes no attempt to rebut the substantive points of Petitioner's argument in which she demonstrates how the Third Circuit's decision fails to comply with this Court's mandate in *Clackamas* and the untenable position in which professional women and other minorities will find themselves if the Third Circuit's decision is permitted to stand. *Pet.* at 19-25. Instead, Respondent tries to trivialize the important employment discrimination issue by comparing the media attention that this case has received, which demonstrates that interest in this important issue

and the Third Circuit's decision extends beyond the Petitioner, to the media attention focused on the domestic problems of Britney Spears. *Opp.* at 12. Respondent has no answer to the argument articulated by Petitioner that under the Third Circuit's decision, professional women and other minorities can be denied the substantial legal rights afforded by anti-discrimination laws merely by virtue of being made nominal shareholders by the professional corporations which employ them. Notwithstanding Respondent's assertion to the contrary, Petitioner has demonstrated the importance of this issue which satisfies the requirements of Supreme Court Rule 10(c).

II. THE THIRD CIRCUIT'S DECISION EFFECTIVELY CREATES A SPECIAL STATUS FOR LAW FIRMS AND OTHER PROFESSIONAL CORPORATIONS IN THEIR EMPLOYMENT OF FEMALE PROFESSIONALS WHICH IS NOT PERMITTED BY *CLACKAMAS*.

Petitioner has demonstrated that the Third Circuit's failure to consider her substantial contradictory evidence effectively creates a separate status for law firms and other professional corporations which is not permitted by this Court's decision in *Clackamas*. Respondent's contention that the Third Circuit properly applied the *Clackamas* test is without merit. In attempting to justify the Third Circuit's decision, Respondent does nothing more than apply the same faulty analysis utilized by the Third Circuit. *Opp.* at

13-35. Like the Third Circuit, Respondent relies exclusively on facts that favor its position while totally ignoring the substantial contradictory factual evidence marshaled by Petitioner which supports her position that notwithstanding her nominal title of shareholder, the underlying reality in this case shows that she had no real control over the management and operation of Respondent's business and that she did not participate in the profits realized by the law firm. Petitioner's contradictory evidence created genuine issues of material fact with regard to each of the six factors under *Clackamas* thereby making the issue of her employment status completely inappropriate for summary judgment.

For example, Respondent erroneously asserts that the issue of whether Respondent's Executive Committee can terminate the employment of a shareholder is governed by Section 2.09 of Respondent's By-Laws which provides that a shareholder's relationship with Respondent can only be terminated by an affirmative vote of three-fourths of the other Class A shareholders and only for cause. *Opp.* at 16. Petitioner submitted contradictory evidence which establishes that, in fact, decisions concerning termination of shareholders are made by the Executive Committee by virtue of the power that it wields in connection with compensation

and work assignment matters. *App. 1122a, 2355a-2356a, 2521a.*[1]

Petitioner's evidence demonstrates that when the members of the Executive Committee desire to terminate the employment of a shareholder attorney, they reduce the amount of work assigned to the attorney. *App. 1123a, 1302a, 2355a-2356a, 2551a.* As a result of the reduction in work, the billed hours and profitability of the attorney go down, thereby giving the Executive Committee reason to lower the compensation paid to the attorney. *App. 1123a, 1302a, 2356a, 2551a.* With repeated reductions in compensation or the threat of reduction in compensation, the attorney becomes frustrated and leaves the firm, giving the members of Respondent's Executive Committee what they wanted, i.e., the termination of the attorney's employment with Respondent. *App. 1123a, 1302a, 2356a, 2552a.* Hunter A. McGeary, Jr. and David M. Neuhart are former Class A shareholders of Respondent who submitted affidavits in this case on Petitioner's behalf. Both McGeary and Neuhart testified in their affidavits that they were targeted by Respondent's Executive Committee in this manner. *App. 1123a-1124a, 1180a, 2351a-2352a, 2356a, 2362a, 2364a-2365a.* McGeary left Respondent as a result of the Executive Committee's threat to reduce his salary. *App. 1123a-1124a, 2362a, 2364a-2365a.* Neuhart

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[1] All citations to "*App.*" in this Reply Brief are references to the Appendix filed in the United States Court of Appeals for the Third Circuit.

left Respondent as a result of actual reductions in his salary made by the Executive Committee. *App. 1124a, 1180a, 2351a-2352a, 2356a.* The Third Circuit improperly ignored this evidence which demonstrates the realities of how Respondent actually terminates a shareholder's employment despite the provisions of Respondent's By-Laws. Instead, the Third Circuit focused only on the formalities of Respondent's By-Laws in concluding that Petitioner's employment could only be terminated by a vote of three-fourths of all shareholders for cause.

Similarly, Respondent's contention that undisputed evidence establishes that Petitioner has a meaningful opportunity to influence the firm is contradicted by Petitioner's overwhelming evidence which demonstrates that she has no meaningful input into or influence over the control, management and operation of Respondent. In fact, Petitioner's evidence, which was ignored by the Third Circuit, shows that the Executive Committee does not comply with the By-Laws on which the Third Circuit relied in concluding that Petitioner is not an employee of the firm. The Executive Committee has created the illusion of corporate participation by Petitioner which is nothing more than a sham to maintain control of Respondent in the hands of the Executive Committee.

Petitioner's evidence demonstrates that shareholders make a $7,500.00 capital contribution which is a nominal amount and is part of the sham arrangement at Respondent. The capital contribution is intended to give the illusion of ownership to

shareholders of Respondent. It has no relationship whatsoever to the approximately $51 million dollars per year that Respondent is currently billing nor to the income received by the various shareholders of Respondent. *App. 1222a, 1788a-1791a, 1803a-1809a, 2083a, 2347a-2348a, 2362a, 2385a-2397a.* Although Respondent's billings increased from $33 million dollars annually to $51 million dollars annually over the past 5 years, the nominal amount of the capital contribution, $7,500.00, has remained unchanged for new shareholders. *Id.* Similarly, the amount of the capital contribution has remained unchanged even though the income of the various shareholders has increased during the relevant period. *App. 1222a, 1788a-1789a.*

The illusion of corporate participation is perpetuated by Respondent's Executive Committee in the way it makes decisions in secret and then presents them to the Board of Directors for an after-the-fact oral rubber stamp ratification. *App. 1159a-1210a, 1243a-1244a, 1266a, 1272a, 1277a-1279a, 1283a, 1286a-1287a, 1291a-1292a, 1296a, 1312a-1313a, 1316a-1329a, 1362a, 1368a-1369a, 1400a-1402a, 1404a-1406a, 1409a-1410a, 1412a-1413a, 1416a-1417a, 1453a-1470a, 1475a-1494a, 1497a-1499a, 1507a-1508a, 1513a-1515a, 1559a-1561a, 1591a-1595a, 1604a-1605a, 1618a-1621a, 1624a-1626a, 1641a-1642a, 1644a-1648a, 1658a, 1661a-1666a, 1668a, 1670a-1673a, 1675a, 1701a, 1757a-1758a, 1768a-1777a, 1799a-1800a, 1803a-1809a, 1817a, 1821a-1867a, 1880a, 2000a-2026a, 2049a-2082a, 2084a-2344a, 2346a-2347a,*

2354a-2359a, 2362a, 2364a-2365a, 2372a-2373a, 2375a-2376a, 2386a-2392a, 2424a-2446a, 2549a, 2552a-2557a.

Petitioner's evidence showed that votes taken at meetings of Respondent's Board of Directors are not meaningful in that they are frequently oral yea or nay votes which are prefaced by a request for a showing or sign of support for what the Executive Committee has already decided or done. *App. 1159a, 1278a-1279a, 2358a, 2365a.* As stated by both Hunter McGeary and David Neuhart in their affidavits, they viewed meetings of the Board of Directors as meaningless for this reason and stopped attending. *App. 1176a, 2049a-2050a, 2358a, 2365a.* Apparently, many other shareholders shared that view because there was no quorum of directors at 88 of the 97 Board of Directors meetings held between February of 2001 and June of 2009. *App. 1176a-1207a, 2049a-2081a, 2084a-2336a, 2358a, 2365a.* The Executive Committee presented its decisions to the Board of Directors for ratification without a quorum which is a violation of Section 2.06(a) of Respondent's By-Laws. Petitioner's evidence regarding the lack of a quorum of shareholder/directors in office for the proper transaction of business pursuant to Section 2.06(a) of the By-Laws was undisputed by Respondent yet disregarded by the Third Circuit. *App. 1176a-1207a, 2050a-2081a, 2084a-2336a, 2744a-2751a.*

Petitioner's evidence demonstrates that she has absolutely no voice in decisions relating to compensation, which is critical since this case involves claims of pay disparity. Respondent admits that all

decisions relating to shareholder salary and bonuses are made in secret by the Executive Committee. *App. 1165a-1169a, 1604a-1605a, 1618a-1626a, 1644a-1648a, 1757a-1758a, 1799a-1800a, 1803a-1809a, 1811a-1812a, 1847a-1861a, 2082a, 2354a-2355a, 2364a, 2372a-2376a, 2386a-2391a, 2424a-2446a, 2549a.* Information relating to salaries paid and bonuses awarded to individual shareholders is withheld from Petitioner and other shareholders so that they will not know what other shareholders earn. *App. 1165a-1167a, 1604a-1605a, 1618a-1626a, 1803a-1809a, 1847a-1861a, 2354a-2355a, 2372a-2376a, 2424a-2446a.* Petitioner is not told and does not know what other shareholders of Respondent are earning and does not have access to the books and records of Respondent which contain that information. *App. 1166a-1167a, 1604a-1605a, 1618a, 1625a-1626a, 1847a-1861a, 2354a-2355a, 2373a-2375a, 2424a-2446a.* Prior to this litigation, Petitioner did not know the method by which her compensation and alleged ownership or equity percentage is set by the Executive Committee. *App. 1224a, 2081a-2082a, 2378a.*

Respondent further argues that it was undisputed that Petitioner shared in the profits, losses and liabilities of the firm. *Opp.* at 6-8, 34-35. This assertion is incorrect. Petitioner proffered substantial record evidence to support her position that her compensation is a salary and not a share of profits as asserted by Respondent. Petitioner adduced evidence which shows that her compensation and the compensation paid to other shareholders of Respondent is not

based on an ownership interest in Respondent, which is supposedly in equal shares. *App. 1223, 1628a, 2348a.* Rather, Petitioner's compensation is a salary that is determined in secret by Respondent's Executive Committee using the same criteria it uses to determine the compensation paid to associate attorneys who Respondent admits are employees of the firm. *App. 1223a-1226a, 1516a-1525a, 1618a, 1625a-1627a, 1629a-1632a, 1636a-1639a, 1848a-1861a, 2081a-2083a, 2348a, 2354a-2355a, 2377a-2382a, 2384a-2385a, 2393a, 2403a-2412a, 2455a, 2459a.*

Petitioner's evidence also shows that after setting the salaries, the Executive Committee calculates an alleged percentage of ownership of the firm for each shareholder – which is unrelated to the actual number of shareholders – by working backward from or "backing out" each shareholder's projected compensation from the total projected amount of money available for distribution. *App. 1224a-1225a, 1630a-1631a, 1633a, 2378a, 2384a-2385a, 2393a, 2403a-2412a.* In other words, after projecting the total size of the pie, the Executive Committee slices the pie in dollar terms and then transforms that predetermined dollar amount into a percentage of ownership in the firm. *App. 1225a, 1633a, 2378a.* This percentage supposedly represents the shareholder's ownership or equity interest in the firm. *App. 1224a, 2378a, 2384a-2385a, 2393a, 2403a-2412a.* However, this is not so because the percentage varies every year and is not equal as to each shareholder since it is not arrived at based on the number of shareholders in the firm. *App. 1225a,*

1627a, 1629a, 2379a-2382a, 2403a-2412a. This percentage is applied to Respondent's actual revenues each year to give Petitioner an increased or decreased last payment of the year which Respondent calls a salary bonus on its shareholder history form for Petitioner if it is an increased payment. *App. 1225a, 1516a-1525a, 2083a, 2378a.* Petitioner's total salary for the year is referred to by Respondent on the shareholder history form that it prepares for each shareholder, including Petitioner, as actual salary including bonus, if any. *App. 1225a, 1525a.* Respondent also refers to total salaries paid to shareholders as salary or payroll in notes relating to attorney compensation. *App. 1225a-1226a, 1525a, 1629a, 2455a, 2459a.*

The foregoing evidence of record illustrates that the Third Circuit's affirmation of summary judgment in favor of Respondent was clearly improper. The Third Circuit ignored the overwhelming contradictory evidence proffered by Petitioner, which demonstrates an extremely strong case against the entry of summary judgment, and relied solely on the content of Respondent's By-Laws. In so doing, the Third Circuit has in effect created a separate regime for law firms and other professional corporations. Under the Third Circuit's decision, the by-laws and other formative documents of a law firm are to be taken completely at face value and are not to be examined in light of evidence of the underlying realities of how the law firm is actually operated. In the instant case, the underlying realities show that Petitioner's employment

with Respondent can be terminated without regard to the By-Laws by Respondent's Executive Committee, that Petitioner has no real opportunity to control or manage the operations of Respondent and that Petitioner does not participate in the profits of the firm.

In relying on Respondent's By-Laws to the exclusion of overwhelming contradictory evidence that Respondent does not actually operate in accordance with its By-Laws, the Third Circuit clearly failed to adhere to the holding of this Court in *Clackamas* which requires that evidence of all of the incidents of the relationship between Petitioner and Respondent be considered in determining whether Petitioner, despite her nominal title of shareholder, is entitled to invoke the protections against discrimination in the workplace available under antidiscrimination laws. The Third Circuit, by considering only Respondent's By-Laws and ignoring the evidence of what actually occurs in the operation of Respondent's law firm, has, in effect, deprived the *Clackamas* decision of any meaning.

The Third Circuit's decision merits review by this Court so that professional women lawyers and other minorities who bear the nominal title of shareholder in a professional corporation are able to seek redress for injuries sustained as a result of discriminatory conduct by their employers.

CONCLUSION

For the foregoing reasons, and for those presented in the petition, Petitioner requests that this Court grant her petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

EDWARD B. FRIEDMAN
Counsel of Record
GLORIA A. AIELLO
FRIEDMAN AND FRIEDMAN
900 Fifth Avenue
Pittsburgh, PA 15219
Email: ebf@friedman-law.com
Tel. (412) 261-5834

Attorneys for Petitioner
Alyson J. Kirleis